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IN THE
COURT OF APPEALS OF INDIANA

In Re the Matter of K.J., Jr., R.J., AND E.J.,	)	
	)	
MARIE JAX, and	)	
KEITH JAX,	)	
	)	
Appellants-Respondents,	)	
	)	
vs.	)	No. 45A04-0611-JV-660
	)	
LAKE COUNTY DEPARTMENT OF	)	
CHILD SERVICES and	)	
THE LAKE COUNTY COURT	)	
APPOINTED SPECIAL ADVOCATE,	)	
	)	
Appellees-Petitioners.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
Cause No. 45D06-0601-JT-39; -40; and -41

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Marie Jax ("Mother") and Keith Jax, Sr. ("Father") appeal the trial court's order terminating their parental relationships with K.J., Jr., R.J., and E.J. ("the Children").

We affirm.

ISSUES

Mother's Issues:

1. Whether the trial court committed reversible error when it denied her request for a continuance of the fact-finding hearing.

2. Whether the trial court committed reversible error in the admission of evidence.

3. Whether sufficient evidence supports the termination of Mother's parental relationships with the Children.

Father's Issue:

4. Whether sufficient evidence supports the termination of Father's parental relationship with the Children.

FACTS

Six months after Mother and Father married, Mother's biological daughter J. "was given up" to J.'s father's mother. (Tr. 117). Mother had no contact with J., who was developmentally disabled, for the next thirteen years. In the meantime, Mother and Father had three children: K., Jr., born December 15, 1992; R., born November 21, 1993; and E., born September 30, 1996.

In October of 2000, police responded to an address on Hayes Street in Gary and found the family living in an "extremely filthy" motor home parked in the yard.

(Mother's App. 58, 62). Finding the Children "all dirty and without shoes and . . . not enrolled in school," with E. having "several cuts on his feet and badly decayed teeth," the Lake County Department of Child Services ("DCS") removed the children from the parents' custody. *Id.* Mother and Father were both charged with four counts of criminal neglect of a dependent. On March 1, 2001, Mother and Father each stipulated to the foregoing facts and pleaded guilty to two counts of neglect of a dependent.[1] In 2006, Father testified that in 2000, the Children were removed because their "house was dirty" and there was "garbage in the yard"; and that he and Mother then took parenting classes, "cleaned up the yard, got rid of all the garbage in the yard," and "fixed up the house" at the Hayes Street address in order to regain custody. (Tr. 93, 95). In about April of 2001, the children were returned to the parents' custody.

On June 17, 2003, J. "turned eighteen," and Mother arranged with Child Protective Services of California, to bring J. from California to Gary. (Tr. 117). On September 24, 2003, police responded to reports of screams coming from the parents' residence on Hayes Street. The responding officers summoned Officer John Gruszka with "concerns over the living conditions" there. (Tr. 33). In the living room area, Gruszka observed trash on the floor and nine dogs on a couch; in the kitchen, dirty dishes and clothes lying around; in the family room area, debris on the floor and "holes in the floor where you could actually see down into the basement." (Tr. 34). In the basement, he observed

[1] Father was sentenced to two years of probation, and Mother was sentenced to two years of house arrest.

puddles of water, exposed electrical wires, and a room with a lock on the outside of the door. Father informed him the lock was to "keep [J.] inside the room." (Tr. 37).

Police reported concerns about the living conditions of the Children to DCS, and assessment worker Novella Donaldson was sent to the residence on Hayes Street. She saw the front yard "covered with debris," more debris and damp, mildewed clothes on the porch, and the living room floor "covered with garbage." (Tr. 24). Donaldson did not enter the house because "the stench" was "just too much." *Id.* Donaldson asked Mother "why the house was the way that it was," and "her response was, she did not find any problem with the way the house was." *Id.*

Father admitted to Gruszka that he and Mother had committed acts of physical abuse against J. Father and Mother were arrested, and both Father and Mother were charged with seven criminal counts in that regard.

CHINS petitions were filed with respect to K., R., and E., alleging *inter alia* that they had been endangered by the conditions of their home, after having been previously "removed from the parents due to similar allegations concerning the home." (Mother's App. 35, 37, 39). Fact-finding and disposition hearings ensued. On August 10, 2005, the Children were made wards of DCS retroactive to September 24, 2003.[2]

In the meantime, on March 12, 2004, Father and the State had reached a written plea agreement whereby he would plead guilty to the battery of J., as a class C felony, and would cooperate in the prosecution of Mother, and the State would dismiss the other

[2] According to testimony at the termination hearing, the CHINS court had repeatedly delayed the order of wardships because prosecution of Mother's criminal charges continued to pend.

criminal charges filed against him. With the agreement was a stipulated factual basis wherein Father admitted he "and [Mother]" had shocked J. "with exposed wires of an electric cord that was plugged into an electrical source," that Mother "shov[ed] a fireplace poker into [J.'s] vagina," that J. "would cry out in pain and beg them to stop," and that he "would force J[.] to eat cigarettes to the point where she would get sick and throw-up, and [Mother] would then make J[.] eat the vomit off of the floor." (Mother's App. 47). Father was sentenced to eight years, with two years suspended. He was released from imprisonment on June 23, 2006.

After their removal in September of 2003, the children were placed in foster care in the Stewarts' home. On March 29, 2006, DCS filed a petition alleging that termination of the parents' parental rights was in the best interest of the Children. The fact-finding hearing thereon was held on October 4, 2006. Evidence to support the foregoing facts was presented. Mother did not appear at the hearing, and testimony indicated that her prosecution on the pending criminal charges was ongoing.

Officer Gruszka testified that the "dirty, deplorable condition" of the residence on Hayes Street "would jeopardize [the] safety" of any children living there. (Tr. 39). Donaldson testified after being at the residence, she collected the Children from their school. There, the principal had advised her of calling the parents' home with concerns about "the progress that the [C]hildren were making in school," and about their not being properly clothed and being hungry. (Tr. 29).

Christina McDade, the DSC caseworker for the Children since October of 2003, testified that after the initial hearing, she suggested that the parents keep in contact with

the Children by writing letters. Mother "never followed through with keeping in contact with the children." (Tr. 54). Further, Mother did not maintain contact with McDade, who did not even know Mother's whereabouts for a year or so before the final hearing.[3] Father did write the Children from jail. However, the Children "had to be encouraged to write" Father; "they never really wanted to write." (Tr. 54). McDade saw the Children regularly, and testified that they "don't ask about mom and dad and how are they doing." (Tr. 63). McDade opined that the Children would talk about them "if they felt safe with their parents," and testified that the Children "never do." (Tr. 66). McDade testified that the condition of the home was a major reason for termination, after they had been removed for the second time "for basically the same thing, the same issues." (Tr. 63). According to McDade, at the time of their removal, the Children had significant hygiene issues and problems with limited attention spans, but they had now resolved these issues and were doing well in the Stewarts' home and at school. McDade opined that the Children "might be in harm's way" if returned to the parents, and it was not "in the best interest for the children to go back to either." (Tr. 64). McDade testified that the children had told her "that they want to stay with the Stewart family," where they had lived since the fall of 2003. (Tr. 58). McDade further testified that the Stewarts "really care about the children and their well-being and they desire for the kids to be there as well." (Tr. 57). Mrs. Stewart testified that she and her husband wanted to adopt the Children.

[3] McDade testified that she saw Mother about a month before the fact-finding hearing when Mother appeared for a criminal proceeding. McDade "asked where she was living . . . what is she doing," and Mother "didn't want to talk about anything about that." (Tr. 74).

Father testified that although he was married to Mother, and J. was Mother's child, he did not "consider her" his stepchild. (Tr. 91). Father further testified that now that he was no longer incarcerated, he desired to complete whatever services were necessary to regain custody, and he asked "time to be able to receive services." (Tr. 112).

The trial court found that there was a reasonable probability that the conditions resulting in the removal of the Children from their home would not be remedied. It noted the conditions at the residence on September 23, 2003; evidence of the torture of J. by Mother and Father; Father's admissions of such actions and his conviction; Mother's failure to protect J.; the previous removal of the Children upon allegations of neglect and filthy conditions of the home, with the parents pleading guilty to two counts of neglect and completing services and then regaining custody; that since removal, Mother had failed to communicate with the Children, and although Father had written to them, they had to be pressed to respond; neither Mother nor Father had complied with the case plan; Mother had not kept the case manager advised of her whereabouts; Father had not sought services during his incarceration; the Children had been taken from the parents' custody in September of 2003, were now "very stable," and did "not want to return to either parent's care"; and that neither parent had provided "any financial or emotional support for" the Children during the past three years. (Order p. 3). It then ordered the parental relationships of Mother and of Father with the Children terminated.

DECISION

Parental rights are of a constitutional dimension, but the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental

responsibility. *In re R.S.*, 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), *trans. denied* (citing *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*, *cert. denied*)). The purpose of terminating parental rights I`s not to punish parents but to protect children. *Id*.

The trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *R.S.*, 774 N.E.2d at 930. Termination of the parent-child relationship is proper where the child's emotional and physical development is threatened. *Id.* Moreover, the trial court need not wait until the child is irreversibly harmed such that his physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.* The parent's habitual pattern of conduct is relevant to determine whether there is a substantial probability of future neglect or deprivation of the child. *Id.*

The appellate court will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. *Id.* at 929-30. When reviewing the sufficiency of the evidence to support the judgment of involuntary termination of the parent-child relationship, we neither reweigh the evidence nor judge the credibility of witnesses. *Id.* at 930. We consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. *Id.*

When a county office of family and children seeks to terminate parental rights, the office must plead and prove in relevant part that:

> (A) The child has been removed from the parent for at least six (6) months under a dispositional decree; . . .
> (B) There is a reasonable probability that:
>
> > (i) the conditions that resulted in the child's removal or the reasons for placement outside the home will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) Termination is in the best interests of the child; and

(D) There is a satisfactory plan for the care and treatment of the child.

Ind. Code §§ 31-35-2-4(b)(2), 31-35-2-8(a).

1. Mother's Motion for a Continuance

Mother first argues that the trial court committed reversible error when it denied her request for a continuance of the fact-finding hearing. Noting that the trial court had acknowledged at the initial hearing that Mother had cancer,[4] she posits that it "was likely that her absence" at the fact-finding hearing "was due to her extreme and recurring maladies." Mother's Br. at 13. She cites to *Rowlett v. Vanderburgh Office of Family and Children*, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied*, to support her contention that the denial of a continuance was unreasonable.

Mother's argument fails to provide the requisite standard of review. *See* Ind. Appellate Rule 46(8)(b) ("argument must include for each issue a concise statement of the applicable standard of review"). The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *Rowlett*, 841 N.E.2d at 619. An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion. *Id.* However, no abuse of discretion will be found when the moving party has not demonstrated that she was prejudiced by the denial. *Id.*

[4] The record simply indicates that Mother had suffered from cancer at some point after the criminal charges were filed. No details as to the nature or extent of her illness can be found in the record.

In *Rowlett*, we found that Father had shown good cause for granting his motion to continue the dispositional hearing in a CHINS matter. We noted that the trial court was advised when the continuance was sought that Father would be released from incarceration six weeks before the scheduled hearing. Further, the children at issue had not been removed from his custody but from that of the mother, and at the time of the removal, Father "was trying to establish paternity so he could get custody" of the children. *Id.* at 618. Father had never been offered any services because he had not been adjudicated the children's parent. Moreover, Father had expressed an intention "to become established in the community and to participate in services directed at reunifying him with" the children upon his release from incarceration. *Id.* at 618, 619.

The showing made in *Rowlett* was not similarly made by Mother. Here, Mother's counsel simply speculated that her absence was related to her health. Counsel admitted that he had spoken to Mother "last week and she [was] certainly aware of the date." (Tr. 20). Both DCS and the CASA (appointed for the Children) were ready to proceed. The trial court expressly noted that throughout the hearings in the termination matter, Mother had "never appeared." (Tr. 21). The trial court found this fact to "indicate . . . that there's a good chance and a good likelihood that she won't ever appear, and so as to not continue this matter out unnecessarily," it denied the motion. *Id.* The trial court's conclusion that Mother had no desire to be present is not unreasonable. Further, Mother has not demonstrated that she was prejudiced by the denial of her counsel's motion for a continuance. *See Rowlett*, 841 N.E.2d at 619. Therefore, we find no abuse of discretion in the trial court's denial of the motion.

2. Admission of Evidence

Next, Mother argues that the trial court committed reversible error when it "allowed into evidence over Mother's objection the probable cause affidavit filed with Mother's criminal charges." Mother's Br. at 14. She asserts that the affidavit "contained hearsay that was extremely prejudicial to" her, and that its admission violated her right of confrontation and cross-examination pursuant to Indiana Code section 31-32-2-3. *Id.* Mother acknowledges that Father's testimony confirmed certain facts stated in the affidavit, but she directs our attention to other things therein about which there was no evidence presented at the termination hearing.[5]

Again, Mother's brief fails to provide the standard of review. In proceedings to terminate the parent-child relationship, the admission of evidence is left to the sound discretion of the trial court, and we will not reverse except for an abuse of that discretion. *In re A.H.*, 832 N.E.2d 563, 567 (Ind. Ct. App. 2005). Further, even if evidence is erroneously admitted, we will not reverse the judgment if the properly admitted evidence is more than sufficient to support the termination of parental rights. *Id.* at 569.

The subject of the probable cause affidavit was the abuse inflicted on J. by Mother and Father. In this regard, the trial court's found as follows:

> Father admitted in open court that J[.] was tortured and is going to testify against his wife in the criminal matter. Father admitted to beating, shocking J[.] by exposed wires from an extension cord and making J[.] eat cigarettes on multiple occasions as forms of punishment. Father admitted in open court to locking J[.] in a room by herself. Father admitted in open

[5] The affidavit, although signed by Gruszka, summarized information provided to him at the Hayes Street residence on September 24, 2003, by Officer Garcia and a man named Kevin Carter as well as the statements made to Gruszka by J.

> court to be [sic] the instigator of the abuse and the inhumane torture. Father admitted in open court to initiating the abuse on multiple occasions. Mother was a party to the abuse and did nothing to protect her daughter.

(Order, p. 2).

Thus, the facts found by the trial court regarding the abuse of J. were based on Father's testimony. Because the trial court did not rely on other evidence about the abuse of J. from the probable cause affidavit, we would find an abuse of discretion in its admission only if the other evidence presented was not sufficient to support the trial court's order that Mother's parental rights be terminated. *See A.H.*, 832 N.E.2d at 569. Accordingly, we turn to that issue.

3. Evidence to Support Termination of Mother's Parental Rights

Mother argues that there was "[l]ittle, if any evidence . . . to indicate that the children had been harmed in any manner by Mother." Mother's Br. at 15. She acknowledges that the trial court found her "home was not safe for the children to reside in." (Order, p. 2). She further admits that "the trial court was not incorrect in its finding that the conditions which resulted in the removal of the Children was the 'deplorable condition' of her home." Mother's Br. at 17. However, Mother contends that because the evidence did not show her children had "actually . . . been injured" by its condition, this finding simply concludes that the "dilapidated and unclean environment" which she provided for the Children was "one in which no one would prefer to live if he had a choice." Mother's Br. at 16. Mother proceeds to note the multitude of negative circumstances from which the Children were not found to suffer. In effect, Mother asks that we reweigh the evidence presented. This we do not do. *See R.S.*, 774 N.E.2d at 930.

Both Gruszka and Donaldson found Mother's home to pose a danger to the Children's health and safety. Moreover, we agree with the CASA that the repeated torture of a half-sibling by the parents supports the inference that the Children's psychological well-being may be at risk in the custody of the parents. Further, Mother does not contest the total lack of any evidence that she attempted to contest the termination or to expend even a single personal effort toward achieving a reunification with the Children. We find that there is sufficient evidence to support the trial court's conclusion that the conditions resulting in the removal of the Children will not be remedied and that it is in their best interest that her relationship with them be terminated.

4. Evidence to Support Termination of Father's Parental Rights

Father argues that the DFS failed to establish the reasonable probability that the conditions which resulted in the removal of the Children from his home will not be remedied. He makes a series of arguments in this regard.

First, Father asserts that this conclusion by the trial court cannot be sustained because it "failed to consider the circumstances of [Father]'s previous living condition, versus his current suitable home." Father's Br. at 8. According to Father, DFS was required to view and evaluate his current two-bedroom residence (obtained three months after the petition for termination had been filed) and compare it to the residence on Hayes Street. However, the evidence establishes that the Children had previously been removed from Father's custody for nearly the same unacceptable living conditions, and after Father had learned of this unacceptability and corrected the conditions, Father had nevertheless allowed the conditions to recur. The evidence supports the inference that

such would happen again. As we have said, the trial court need not wait until children are irreversibly harmed before terminating the parent-child relationship. *R.S.*, 774 N.E.2d at 930.

Father next contends that due to his incarceration, he was unable to comply with the requirement of the case plan, *i.e.*, "the system failed" him. Father's Br. at 9. We find the same reasoning articulated above also applies to this argument. Father had been provided services in the past, and he had learned what conditions were necessary for an acceptable home for the Children. However, Father simply chose not to maintain those conditions. We also agree with the CASA for the Children that, as we stated in *Prince v. Dept. of Child Servs.*, 861 N.E.2d 1223, 1231, in the course of termination proceedings, "the responsibility to make positive changes" and to take action in that regard rests with the parent, not the DCS.

Father also argues that there was no evidence that the Children were "ever injured by anyone." Father's Br. at 9. However, as already noted, both Gruszka and Donaldson found Father's home to pose a danger to the Children's health and safety. Moreover, we agree with the CASA that the repeated torture of a half-sibling by the parents supports the inference that the Children's psychological well-being may be at risk in the custody of the parents. Further, it is undisputed that Father had had no physical contact with the Children for three years. This separation was a result of Father's actions. Although Father did write to the Children, they were not interested in responding to the correspondence. We find that there is sufficient evidence to support the trial court's conclusion that the conditions resulting in the removal of the Children will not be

remedied and that it is in their best interest that Father's relationship with them be terminated.

It is undisputed that the Children had been removed from the parents' care and custody for more than six months at the time of the final hearing. It also appears to be undisputed that there was a satisfactory plan for the care and treatment of the children – adoption. The parents do not appear to challenge the trial court's conclusion that termination is in the best interests of the Children. Further, we have found that the evidence before the trial court supports its conclusion that the conditions that resulted in the removal of the Children from the parents' custody and their placement outside the parents' home will not be remedied. Therefore, the trial court's conclusion that the DCS established the statutory prerequisites for terminating the parent-child relationship is not clearly erroneous. *R.S.*, 774 N.E.2d at 930.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.